2003

West Valley City v. Teresa Foy : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,	)	
	)	
Plaintiff-Appellee	)	
	)	
vs	)	Docket No. 2003-0503
	)	
TERESA FOY,	)	Priority 15
	)	
Defendant-Appellant	)	ORAL ARGUMENT REQUESTED

APPELLANT'S REPLY BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY

The Honorable Pat B Brian, District Judge

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,	)	
	)	APPELLANT'S
Plaintiff-Appellee	)	REPLY BRIEF
	)	
vs	)	Argument Priority 15
	)	
TERESA FOY,	)	Case No. 2003-0503
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APPELLANT'S REBUTTAL ARGUMENTS

I
FOY'S "REQUEST FOR HEARING" WAS TIMELY FILED

A
ISSUES RAISED FOR THE FIRST TIME ON APPEAL SHOULD NOT BE CONSIDERED

The Appellee CITY asserts [pp. 13-17 of APPELLEE'S BRIEF] that the "request for hearing" was not timely. The Appellee further acknowledges---in Footnote #2 on page 14 of APPELLEE'S BRIEF---that

> "for an unknown reason, both Foy's counsel and the City's counsel below adopted October 30th, 1997 as the due date for the request for hearing."

Emphasis added. That is exactly correct! Such---i.e. that the "request" was due on or before October 30th---was adopted by the CITY early in the litigation. See CITY's Memorandum of Law in Support of Motion for Summary Judgment, ¶5, RECORD at 000035]. The CITY's position---that the "request" document WAS TIMELY

RECEIVED---was never abandoned nor retreated from BY THE CITY'S TRIAL COUNSEL during the entirety of the 5-year litigation in the trial court. Indeed, as recently as the final 13 January 2003 "summary judgment" hearing---the hearing at which the CITY finally obtained the "summary judgment"---the CITY's trial counsel (Mr Lawrence) acknowledged during his arguments before the Court:

> **Mr. LAWRENCE: . . . Ms. Foy now argues that a letter which the City received <u>which we acknowledge receiving and we acknowledge receiving it within the time period</u>** but it was from a person named Kay Cooper, supposed a tenant on the property.

See Transcript of Summary Judgment Hearing, 13 January 2003, page 2, line 8 through page 3, line 3. Emphasis added. RECORD at 000732-000733.

Later during that same 13 January 2003 "summary judgment hearing" Mr LAWRENCE stated:

> Mr LAWRENCE: . . . I believe it was October 28th or 29th **which <u>was within the ten day period</u> for her to respond. <u>Within that ten day period</u> the City received a letter** signed by someone named K. Cooper, the initial "K".

See Transcript of 13 January 2003 Summary Judgment Hearing, page 23, lines 8 through 19. Emphasis added. RECORD at 000753.

Principles of "estoppel" and "waiver" now PRECLUDE the CITY from now asserting---as its "appellate counsel" now does---that the "request for hearing" was untimely. Similarly, the CITY should be estopped from asserting the claimed untimeliness of the "request" by

reason of the CITY's uncooperative resistance to any and all "pre-trial discovery" on the issue.

To raise the "untimeliness" issue now---for THE FIRST TIME---which the "footnoted" text from APPELLEE'S BRIEF implicitly recognizes---when the case is now "on appeal" goes clearly against long- standing precedent. Arguments which have not been raised before the trial court are not preserved and will be considered when raised for the first time on appeal. **Dansie vs Anderson Lumber Company**, 878 P.2d 1155 (Utah Court of Appeals 1994); **Wurst vs Department of Employment Security**, 818 P.2d 1036 (Utah Court of Appeals 1991); **Olson vs Park-Craig-Olson, Incorporated**, 815 P.2d 1356 (Utah Court of Appeals 1991).

B

THE "REQUEST FOR HEARING" WAS FILED TIMELY IN ACCORDANCE WITH THE PROVISIONS OF SECTION 63-37-1, UTAH CODE

The Plaintiff's analysis, calculations and conclusion (of untimeliness) are further inappropriate and flawed when the provisions of Section 63-37-1, Utah Code, are considered, thus:

> Any report, claim, tax return, statement or **other document** or any payment **required** or authorized **to be filed** or made to the state of Utah, or **to any political subdivision thereof, which is:**
>
> > (1) **Transmitted through the United States mail, shall be deemed filed or made and received by the state or**

> **political subdivision on the date shown by the post-office cancellation mark stamped upon the envelope or other appropriate wrapper containing it.**
>
> **(2) . . . [provisions pertaining to unreceived mailings]**

Emphasis added. Section 63-37-1 was in effect in 1997, at the times material hereto. [The provision has been renumbered (since 2000) and is now found at Section 68-3-8.5, Utah Code, with slight text amendments.]

The original envelope---which would have shown the October 27th mailing---was last in the custody of the Plaintiff WEST VALLEY CITY. If this were then (6 years ago) perceived to be such a dispositive issue upon which the City would have based its action, one would think the CITY would have preserved the envelope and such would be "in evidence" before the Court. The CITY didn't and the actual "postmarked" envelope isn't "in evidence".] In evidence is the "certificate of mailing", confirming the October 27th mailing date. That "certificate"---at RECORD 00096---is the functional equivalent of the "postmark" on the envelope and should be sufficient documentation of the timely mailing. Thus, per the arithmetic calculations engaged in by Plaintiff's appellate counsel, the October 27th mailing is TIMELY! [As with all of the pre-trial discovery, the CITY actively resisted in cooperating, to disclose when the "request for hearing" might have

actually been "received" by the CITY itself, not merely the A.C.E. office. But such analysis is arguably "moot" in any event, given the statutory mandate of Section 63-37-1, Utah Code---which does explain and legitimize the position taken by the CITY's trial attorney: that the date of mailing and/or "receipt" of the "request for hearing" was never an issue.] In accordance with the provisions of Section 63-37-1, Utah Code, the mailing is timely and Plaintiff's newly-fabricated assertions and conclusions (not presented to the trial court) to the contrary are meritless.

II

THE GENERALIZED ENABLING LEGISLATION OF SECTION 10-8-84, UTAH CODE DOES NOT OVERCOME THE SPECIFIC REQUIREMENTS OF SECTION 10-11-2, UTAH CODE, PERTAINING TO MUNICIPAL ENFORCEMENT ACTIVITIES INVOLVING "WEEDY LOTS" AND SIMILAR VIOLATIONS

The Plaintiff-Appellant WEST VALLEY CITY argues [pp. 18-21 of APPELLEE'S BRIEF] that the generalized enabling legislation of Section 10-8-84, Utah Code, and the abolition of the so-called "Dillon's Rule" under the Utah Supreme Court's decision in the case of **State vs Hutchinson**, 624 P.2d 1116 (Utah Supreme Court 1980), entitles the CITY to disregard the statutory requirements of Section 10-11-2 et seq, Utah Code. Such is patently in error!

That approach misreads both THE STATUTE (Section

10-8-84) and the **Hutchinson** decision. It is readily apparent that Section 10-8-84, Utah Code, is generalized legislation and is kind of a "catch-all enabling legislation". Over the decades, Section 10-8-84---and its predecessor provisions---have been relied upon to uphold municipal ordinances in the face of challenge, particular "Dillon's Rule"-type challenges. The fatal flaw of the CITY's analysis is the simple fact that Section 10-8-84 was worded thus:

> They [cities, acting through their legislative governing bodies] may pass all ordinances and rules, and make all regulations, **not repugnant to general law,** necessary for . . .

Emphasis added. Thus, the question arises: is the West Valley City A.C.E. program (and its foundational ordinance), in the "weedy lot" context, "repugnant to law" when the A.C.E. provisions are so diametrically opposed and antagonistic to provisions of state law SPECIFICALLY GOVERNING this subject, namely, Section 10-11-1, Utah Code?

Furthermore, Appellee CITY misreads the operational effect of the **State vs Hutchinson** decision. Without a doubt, **Hutchinson** repealed the so-called "Dillon's Rule" [which, briefly stated, proved for a narrowly-construed, presumptively-disfavored judicial interpretation against municipal exercise of implied powers]. The issue here is not, per se, dealing with

"Dillon's Rule". That issue has been decided: correctly. The error the CITY makes is that **Hutchinson**, and the announced demise of "Dillon's Rule", are NOT intended and were NEVER intended as an "open the floodgates" liberalization that local governments could adopt anything they wanted! TO THE CONTRARY, the Supreme Court in **Hutchinson** expressly recognized that one of the appropriate reasons to then-abandon the anachronistic "Dillon's Rule" (which was for the most part a methodology of judicially-followed jurisprudence rather than a grant of legislative "enabling legislation") was the EXISTENCE OF CONSTITUTIONAL AND STATUTORY LIMITATIONS UPON THE EXERCISE OF POLICE POWERS BY LOCAL GOVERNMENT. This concept---that municipalities are still subject to the LIMITING EFFECT of state statutes---is made absolutely clear in **Hutchinson**, thus:

> There are ample safeguards against any abuse of power at the local level. Local governments, as subdivisions of the State, exercise those powers granted to them by the State Legislature, and the exercise of a delegated power is subject to the limitations imposed by state statutes and state and federal constitutions.

624 P.2d at 1121. Emphasis added. Citation to cases omitted.

Thus, the CITY's analysis fails on both issues: Section 10-8-84 and all local government "rights"

thereunder are subject to the "not repugnant to law" LIMITATION. Furthermore, **Hutchinson,** by its express reason, similarly RECOGNIZES THERE ARE LIMITATIONS which are placed upon municipalities BY OTHER STATUTES.

The decision of the Utah Supreme Court in the case of **Harding vs Alpine City**, 656 P.2d 985 (Utah Supreme Court 1982) is illustrative and, arguably, dispositive. In **Harding** the municipality had attempted to require, by ordinance, the mandatory connection to the public sanitary sewer line if the occupied structure were located within 500 feet; state statute authorized municipalities to require the connection if within "300 feet". In holding the municipal ordinance invalid, the Supreme Court---noting the "not repugnant to law" provisions of Section 10-8-84 and the limitations expressed within **Hutchinson**---correctly observed that were the municipality's position to be accepted, the "300 feet" LIMITATION (of the enabling legislation) would have no meaning.

In this same context, if the CITY's position---to the effect that Section 10-8-84 and/or **Hutchinson** supersede and override the provisions of Section 10-11-2 et seq---is accepted, then **the EIGHT HUNDRED FIFTY-SEVEN words of Sections 10-11-2 through 10-11-4 are effectively WRITTEN "OUT" OF THE STATUTE!**

The City's attempted justification of its ordinance simply fails.

A

PRINCIPLES OF STATUTORY CONSTRUCTION IN SITUATIONS OF CONFLICTING STATUTES

The foregoing situation---the interpretation and application of two arguably conflicting statutes---invokes the long-standing, time-honored principle of statutory construction:

> IN THE INTERPRETATION AND APPLICATION OF TWO CONFLICTING STATUTES---OF WHICH ONE STATUTE IS "GENERAL" IN NATURE AND THE OTHER IS "SPECIFIC"---THE PROVISIONS OF THE "SPECIFIC" STATUTE ARE CONTROLLING OVER THE PROVISIONS OF THE "GENERALIZED" STATUTE. **Osuala vs Aetna Life & Casualty**, 608 P.2d 242 (Utah Supreme Court 1980); **Pan Energy vs Martin**, 813 P.2d 1142 (Utah Supreme Court 1991); **Perry vs Pioneer Wholesale Supply**, 681 P.2d 214 (Utah Supreme Court 1984); **Forbes vs St Mark's Hospital**, 754 P.2d 933 (Utah Supreme Court 1988); **State ex rel Public Service Commission vs Southern Pacific Company**, 95 Utah 84, 79 P.2d 25 (Utah Supreme Court 1938); and **Millett vs Clark Clinic Corp.**, 609 P.2d 934 (Utah Supreme Court 1980) ["[W]here the operation of two statutory provisions is in conflict, that provision which is more specific in its application will govern over that which is more general." 609 P.2d at 936-936].

It is readily apparent that the foregoing principle dictates that the interpretation and solution advanced by Plaintiff CITY cannot be sustained; rather, the provisions of Section 10-11-2 et seq, are controlling and the application of the CITY'S "administrative code enforcement" ordinance in this case (i.e. "weedy lot",

deleterious objects, etc.) must fail.[1]

Section 10-8-84 certainly is "general": a "catch-all" as-it-were of "enabling legislation" to authorize municipalities "police powers", according to its terms. The statute is "general". It utilizes and contains the phrase "not repugnant to law": thus, by its own terms, 10-8-84 recognizes there might be situations and applications which are controlled by other provisions of "law" (constitutions, federal statutes, and/or other state statutes). In essence, Section 10-8-84 recognizes and affirmatively "takes a back seat" to and in deference of those other provisions "the law"---more specific and/or more controlling of the situation!

The interpretation advanced by West Valley CITY would have the Court IGNORE the "not repugnant to law" LIMITATION contained within Section 10-8-84, Utah Code, and would invite the Court to IGNORE and overlook the 500+ WORDS contained in Section 10-11-2 et seq. In this context, the Utah Supreme Court has written:

> "It is to be noted that **10-8-84, by its express terms, limits the grant of power to municipalities** to pass ordinances, to those "**not repugnant to law.**"

Allgood vs Larsen, 545 P.2d at 531. Emphasis added.]

---

[1]The CITY's "administrative code enforcement" ordinance also applies to other situations (animal control, etc.). Those situations are not impacted (or invalidated) by the conflict with the provisions of Section 10-11-2 et seq.

The MANDATORY verb "SHALL"---in describing the CITY's duties and responsibilities---is utilized in Sections 10-11-2 through 10-11-5 TWENTY-0NE TIMES, in a variety of contexts!. Obviously, the Legislature---"advisedly" selecting that term and REPEATING ITS USAGE---intended the MANDATORY PERFORMANCE OF THE STATED OBLIGATION. [This must be contrasted with the one-time usage of the permissive "may" (in the context of adoption of ordinances, etc.) in Section 10-8-84.]

The CITY points out---correctly---that Section 10-11-1 utilizes the verb "may" (appoint inspectors). This is correct. Had the Legislature utilized the term "shall" (appoint inspectors), that result would have violated the Utah Constitution. See **State ex rel Wright vs Standford**, 24 Utah 148, 66 Pac. 1061 (1901) [state statute mandating appointment of county fruit tree inspectors violated Article XIII, Section 5 of the Utah Constitution (providing for local control of municipal budgets and finances)]. But IF the municipality is going to interact with the propertyowner---i.e. "clean up your yard"---then the municipality MUST ACT IN THE MANNER DESIGNATED BY THE LEGISLATURE in statute: namely, by the procedures established in Section 10-11-2 et seq. West Valley City's approach---to the effect that "we're going to do it our own way"---contravenes

the STATUTE: BOTH IN ORDINANCE and in result! The CITY's argument that the A.C.E. program is simply "an alternative means of accomplishing the same result" [p. 21 of APPELLEE'S BRIEF] doesn't work!

The instant judicial decision affirming that invalid result and affirming that invalid ordinance must be clearly reversed!

B

MUNICIPAL ORDINANCES ADOPTED IN PROCEDURAL OR SUBSTANTIVE CONTRAVENTION TO STATE STATUTE ARE INVALID

City ordinances not adopted in compliance with statutory procedural requirements are invalid and void ab initio. **Call vs West Jordan City**, 727 P.2d 180 (Utah Supreme Court 1986) ["Failure to strictly follow the statutory requirements in enacting the ordinance renders it invalid . . . and void ab initio." 727 P.2d at 182-183.]

County governments have also been subjected to this result. **Melville vs Salt Lake County**, 536 P.2d 133 (Utah Supreme Court 1975) [county zoning ordinance invalid because of county's failure to follow statutory requirements of notice and publication].

See also **Toone vs Weber County**, 2002 Ut App 103, 57 P.3d 1079 (Utah Supreme Court 2002) [county's purported sale of real estate not in compliance with

statutory procedures invalidated and set aside].

Local governments are without authority to pass any ordinance prohibited by, or in conflict with, state statutory law. **Salt Lake City vs Allred**, 20 Utah 2d 298, 437 P.2d 434 (1968). City ordinance prescribing a greater penalty for trespass than was provided for in the state criminal code is invalid. See **Allgood vs Larson**, 545 P.2d 530 (Utah 1976) [holding "Salt Lake City seeks to exceed the public policy declared by the legislature relating to a new class of offense. It does not have that power of amendment." 545 P.2d at 532.] In the instant case, Plaintiff WEST VALLEY CITY seeks to impose upon Defendant FOY, for her "weedy lot", an administratively-assessed "fine" of ALMOST SEVEN THOUSAND DOLLARS, from a situation in which the City incurred essentially no clean-up costs. Under the provisions of Section 10-11-2, Utah Code, the City's recovery would be limited to recovery of its actual costs in the clean-up! Thus, per **Allgood**, the City's attempt to have a higher "penalty" than allowed by statute for the "weedy lot" invalidates the A.C.E. ordinance. See also **Smith vs Hyde**, 97 Utah 280, 92 P.2d 1098 (1939) [municipal ordinance invalid due to penalty in excess of that allowed by state statute].

The CITY's A.C.E. ordinance program---in the "weedy

lot" context---being in conflict with overriding statute must simply fail!

III

THE CITY'S FAILURE TO COMPLY WITH THE MANDATORY PROVISIONS OF ITS ORDINANCES GRANTING TO DEFENDANT FOY THE "RIGHT" TO A HEARING IS CONTROLLING MORESO THAN THE "AGENCY" ISSUE

The CITY's Brief argues [pp. 11-13] that it was incumbent upon the Defendant FOY to establish the "apparent authority" of her "agent(s)"---e.g. "Renter K Cooper and/or former husband Jim Decker"---in sending to the CITY the "request for hearing" letter. This disingenuous and "intellectually dishonest" argument cannot honored---as the District Court did---as the basis for entry of the summary judgment against Defendant FOY.

The District Court in its "Memorandum Decision" acknowledged the factual disputes inherent in an "agency" context, but nevertheless went on to rule against Defendant FOY. On this narrow issue, the CITY did not submit one shred of "sworn testimony" to support its claims (i.e. no "agency"), let alone to contradict Ms FOY's assertions [See DEPOSITION OF TERESA FOY, page 6. RECORD at 00579, and AFFIDAVIT OF JAMES DECKER, RECORD at 000091-000095] that Jim Decker was her "agent" and that Decker mailed the "request for hearing" document to the CITY, for the purpose of

obtaining the "hearing"!

Against that backdrop (of the CITY's failure to submit even one shred of sworn evidence to the contrary) is coupled the very "request for hearing" document itself, against the generalized framework of the CITY's own ordinance, thus:

1. The "request for hearing" document doesn't just "fall unexpectedly out of the sky", but rather is sent to the exact office to which the CITY's "notice of violation" directs the mailing.

2. The "request for hearing" document is received by the CITY in a timely manner: within the "ten-day period" established by the "notice of violation" sent to Ms FOY in southern Utah. The "request" wasn't "early" nor was it "late"; the "request" was---expectedly---"right on time"! [Absent some kind of "authorization" from Defendant FOY, the factual arrival of the "request" cannot be construed to be mere coincidence or surprise to the CITY or its personnel.]

3. The "request for hearing" CORRECTLY REFERS to the West Valley City A.C.E. "case file number" [i.e. 97-5215], and ties that

case number to the property address in question. [Again, who else but an "authorized agent"---in apparent contact with Ms FOY in southern Utah---would have coincidentally been privy to that information, particularly within a very narrow time-frame?]

4. The "request for hearing" CORRECTLY REFERS to Ms FOY's then-current residence in southern Utah---as so known by CITY personnel.

5. The "request for hearing" document was "filed" in the City's case file for the "Teresa Foy case".

6. The CITY, in response thereto, initially scheduled the hearing on the "Foy case". See JAMES DECKER AFFIDAVIT, ¶7, RECORD at 000093.

7. The CITY "switched" the hearings. [See AFFIDAVIT OF JAMES DECKER, ¶7; RECORD at 00093.] The CITY has acknowledged that a hearing WAS HELD---see CITY's Memorandum of Law in Support of Motion for Summary Judgment, p. 2, ¶¶9-14. RECORD at 000035-000036. This statement---that a hearing was held, is mistaken and disingenuous on the CITY's part. The hearing that was held concerned "the Jim Decker case", which just a few days earlier

had been "opened". [At this early stage in the litigation, the CITY and its attorney hadn't really solidified its position, even though the City's MEMORANDUM characterizes the situation as "undisputed facts". The MEMORANDUM does correctly note that the propertyowner was Defendant FOY, per the administrative hearing officer's findings. But the "hearing officer" was simply wrong, because the propertyowner was Lancer, Incorporated---a fact eventually recognized and accepted by the CITY later in the litigation.]

Against these sworn statements, the CITY provided NO SWORN EVIDENCE IN REBUTTAL. Those "facts" (and the inferences therefrom) must be measured against the City's own ordinance, thus:

1. The CITY's ordinance (and the "notice of violation") document clearly state---numerous times---that the opportunity for the "hearing" is a "right".

2. The CITY's ordinance utilizes the mandatory term "shall" in the context that when the Director receives the "request for hearing", the Director shall schedule the

hearing. There is NO REQUIREMENT that the "request" be signed. There is NO REQUIREMENT as to any particular "format" for the "request", except that it be in writing. Thus, although the "Renter K Cooper" origin---although arguably unexplained at first blush---might be simply ignored, the "bottom line" to the document simply CANNOT BE IGNORED: to the effect THAT A HEARING WAS REQUESTED!

3. The CITY's ordinance expressly makes an "agent" or "lessee" [see "definition" of "person", WVC Municipal Code, §10-1-110(r)] and "tenant", "person with a Legal Interest in real property", and "person in possession of real property" to be a "Responsible Person" tenant" [see "definition" of "responsible person", WVC Municipal Code, §10-1-110(u)]. Thus, facially, the "request for hearing" from "Renter K Cooper" complied with the ordinance! The CITY's staff had no discretion to disregard it.

4. Furthermore, because the CITY's own ordinance [WVC Municipal Code, §10-1-110(u), pertaining to "responsible person"] authorized the CITY---ostensibly on the basis of evidence

to be derived within the "hearing" context---to "determine" WHO MIGHT BE a "responsible person", as that person "responsible for causing or maintaining [the] violation", it was expected---certainly by FOY hundreds of miles away and having no part in the violations---that those persons "responsible" for the claimed "violations" should be able to request a "hearing".

5. Lastly, the CITY---somewhat at odds with its own pleading [see ¶3 of the Complaint, RECORD at 000002] alleging that Defendant FOY is the owner of the 0.15-acre parcel (which she was)---has, within the course of the litigation, adopted the position that she is also PERSONALLY RESPONSIBLE FINANCIALLY for those violations committed or present upon the Lancer, Incorporated parcel! [The CITY ought not be allowed to "split hairs" on the "agency" issue (vis-a-vis the "request for hearing") and then paint Ms FOY's personal liability "with a broad brush" as concerning the "corporate parcel's" violations!] The CITY's position ignores the fact that a corporation can act only through its agents

AND that the "lion's share" of the "violations" were NOT LOCATED on the "Foy parcel", but were rather located on the "Lancer, Incorporated parcel" to the south!

It is "black-letter law" [Rule 56(c) and countless appellate court decisions] that summary judgment is proper in cases where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. In cases where the facts are in dispute, summary judgment is only granted when, viewing the facts in a light most favorable to the party opposing summary judgment, the moving party is entitled to judgment. In this "summary judgment" context the Utah Supreme Court has observed that

> "the facts are to be **liberally construed in favor of the parties opposing the motion**, and those parties are to be **given the benefit of all inferences which might reasonably be drawn** from the evidence."

Payne ex rel Payne vs Myers, 743 P.2d 186 at 187-88 (Utah Supreme Court 1987). Emphasis added. See also **Clover vs Snowbird Ski Resort**, 808 P.2d 1037 (Utah Supreme Court 1991) and **Owens vs Garfield**, 784 P.2d 1187 (Utah Supreme Court 1989).

Given the sworn statements of the Defendant before the Court, "all inferences which might reasonably be drawn" therefrom (**Payne**, supra), and the CITY's own

LACK OF SWORN STATEMENTS, "summary judgment" against Defendant FOY was most improper and must be reversed.

IV

THE "PETITION FOR REVIEW" JUDICIAL REMEDY CLAIM IS INCORRECTLY APPEALED

On appeal, the CITY has raised [pp. 16-18 of APPELLEE'S BRIEF]---FOR THE FIRST TIME---an issue not presented to and considered by the District Court[2]: that FOY "failed to exhaust her administrative remedies" in failing to file a timely "petition for

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[2] The District Court's ruling based upon FOY's "failure to exhaust her administrative remedies", focused upon the Court's analysis that FOY had failed to "request" the "hearing". The District Court, in reasoning and justifying the grant of summary judgment in favor of Appellee CITY and against Appellant FOY, reasoned that FOY had "failed to exhaust her administrative remedies". The apparent factual basis for that ruling was the District Court's incorrectly-concluded conclusion that FOY "personally" had not requested the hearing.

In concluding that Defendant FOY had "failed to exhaust her administrative remedies", the District Court applied statutory standards found in the Utah Administrative Procedures Act [hereinafter "UAPA"], codified at 63-46b-1 et seq, Utah Code. The provisions of the UAPA generally, and specifically the "exhaustion" requirements cited by the District Court, are INAPPLICABLE to the instant situation, by reason of a careful reading of the "definition" provisions of the UAPA [Section 63-46b-2, Utah Code], thus:

> (1) As used in this chapter:
>
> . . .
>
> (b) "Agency" means a board, commission, ... of this state ... **but does not mean ... any political subdivision of the state**...

Emphasis added. Thus, the Plaintiff WEST VALLEY CITY---as a political subdivision of the State of Utah---is not an "agency" [for UAPA purposes] and the "exhaustion of administrative remedies" provisions of 63-46b-14, Utah Code, as expressly relied upon by the District Court are erroneous.

review" with the District Court immediately following conclusion of the A.C.E. administrative proceeding. The CITY asserts FOY is precluded now from asserting any "defenses" or claims within this judicial proceeding filed by the CITY.

Much like the claimed "untimeliness" of the "request for hearing"---as shown above to be "timely" in any event---the City's "exhaustion of administrative remedies" argument HEREIN RAISED FOR THE FIRST TIME "ON APPEAL", must be neither countenanced nor recognized. This argument---that FOY didn't file a "petition for review" in the District Court---was NOT presented to the District Court and the District Court did not rule thereon! Accordingly, such is improperly raised for the first time on appeal. See **Dansie**, supra; **Wurst**, supra; and **Olson**, supra. See also **Broberg vs Hess**, 782 P.2d 198 (Utah Court of Appeals) [where there is no indication in the record on appeal that the trial court reached or ruled on an issue, the Court of Appeals will not undertake to consider the issue on appeal].

There is also an unconscionable unfairness with the City's position. First, that position---ostensibly arising from the provisions of its own ordinances, which in the "weedy lot" context may be invalid as being "repugnant to law" (i.e. Section 10-11-2 et seq)-

--ought not defeat and restrict consideration of FOY's pleaded "defenses". Section 10-11-2 et seq wouldn't have made FOY incur the expense of filing a "district court case" to challenge the municipality's determinations (as to clean-up costs, etc.). Secondly, the CITY's own ordinances characterize the "petition for review" by utilizing the permissive term "may". Thirdly, those same ordinances characterize the "petition for review" as a "judicial" remedy, as contrasted with an "administrative" remedy. So, in the "common law" jurisprudence as herein applied, she hasn't failed to exhaust her "administrative" remedies by failing to seek the "judicial" remedy. [The CITY---not Ms FOY---selected the terms it utilized in the Ordinance.] There is unfairness and lack of "mutuality" in the result---if the CITY's position is accepted---to the effect that FOY must appeal to the District Court (through the "petition for review"), or else she loses ALL HER RIGHTS.[3] It is patently unfair to take the position---as the CITY does---that FOY loses all her opportunity to "defend" against THE JUDICIAL ACTION THE CITY HAS NOW FILED AGAINST HER! Defendant FOY ought to

[3]It is speculative, for sure, but one must wonder what the CITY's position would be within the "petition for review" proceeding, had such been actually filed with the District Court. Would the CITY be asserting the Defendant---as petitioner---couldn't raise the issues she has herein raised? If such wouldn't be the CITY's position, then what is the problem?

be able to raise and litigate all the "defenses" she has pleaded. [The District Court's grant of summary judgment essentially (implicitly) ruled, as a matter of law, that all those "defenses" were invalid and/or ineffective.]

The CITY, by ordinance, cannot ESTABLISH OR RESTRICT THE JURISDICTION OF THE DISTRICT COURT by the provisions of the municipality's own ordinance! In similar vein, the CITY cannot, through such ordinance, side-step and circumvent---in an almost "reverse bootstrapping" setting---appropriate "judicial review" of the very ordinances Defendant FOY seeks to have declared invalid. If the CITY's A.C.E. ordinance is invalid---for example, as contradicting Section 10-11-2, Utah Code---then the "exhaustion" requirements of that same ordinance are similarly invalid and of no effect. The CITY cannot "short-circuit" the process through these claims and thus deny the Defendant the opportunity to defend. In the face of those "defenses", the CITY was not "entitled to judgment as a matter of law" and summary judgment should NOT have been entered.

CONCLUSION

The District Court erred in granting summary judgment against Defendant FOY, when so many of the necessary "facts" were "in genuine dispute":

particularly, when a "request for hearing" had been TIMELY FILED. The "agency" arguments advanced by the City distracted the District Court from the material analysis of the problem: the mandatory provisions of the CITY's own ordinances (requiring a hearing be scheduled AND HELD).

The CITY's "code enforcement procedures" (ostensibly authorizing "administrative fines") when in fact the CITY incurred no actual expenses in the clean-up of the parcel(s), contradicts the detailed and binding guidelines and requirements of Section 10-11-1 et seq, Utah Code, properly pleaded as a "defense" and which should have been overcome before summary judgment could have been entered.

The judgment of the District Court should be and must be reversed.

Respectfully submitted this 17th day of February, 2004.

STEPHEN G HOMER
Attorney for Appellant
TERESA FOY

CERTIFICATE OF DELIVERY

I certify that I caused TWO COPIES of the foregoing APPELLANT'S REPLY BRIEF to be mailed, first-class postage prepaid, to Mr J Richard Catten, Attorney at Law, Office of the West Valley City Attorney, West Valley City Corporation, 3600 South Constitution Boulevard, West Valley City, Utah 84119, this 17th day of February, 2004.